

Livid in Warsaw

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Three days before election Tuesday in the USA, the last thing you need to plunge you ever deeper into depression is another Verfassungsblog editorial. Church-goers stabbed to death in France. Rapidly filling intensive care units all over Europe. We hear it on the news and doom-scroll it on the internet, stuck as we once again are in our homes, contact-restricted, self-isolated and cranky, while outside, November arrives in all its gloom.

Perhaps the best thing to do in this situation, emotionally, is to look at Poland.

The protests there over the last week have been noticed mostly with equanimity by the German public: Alright, so the constitutional court has tightened the abortion law, so who is surprised that women, leftists and intellectuals are upset now?

I wish I could have gone to Warsaw today to see for myself, but the pandemic made me not to. Instead, I have talked to some friends in Poland and asked them for their views. Bottom line: This is big.

Not conservative: right-wing extremist

As you probably know, the week before last, the Polish “Constitutional Tribunal” had declared the current abortion law unconstitutional, as it allegedly does not sufficiently protect the human dignity of the fetus. This abortion law was the product of a compromise in 1993 between the government and the all-powerful Catholic Church and made abortion punishable but for a few very narrow exceptions, the most important of which, in practice, was if the fetus was severely disabled.

It was this exception that the “Constitutional Tribunal” declared unconstitutional. This is not a regular verdict for a whole series of reasons, and the fact that several so-called “[anti-judges](#)” participated in it and that the institution formerly known as the Constitutional Tribunal has long since ceased to deserve this name (hence the quotation marks) is only one of them.

The “verdict” had apparently already been ready a year ago. No-one doubts that the decision to issue it right now was made on the top floor of the ruling party PiS. Why? One can only speculate. To divert attention from the fact that the health system is on the verge of collapse in the pandemic? To reinforce the PiS’s right-wing credentials after the embarrassment of the failed animal rights law which had taken the coalition to the brink of collapse in the summer? Did they hope that anyone would seriously believe that this was the verdict of an independent court for which they could not be held responsible? Whatever it was: at any rate, it bombed spectacularly.

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*Auch in den Rechtswissenschaften gewinnt **Open Access** zusehends an Bedeutung. Einher geht die Öffnung akademischer Wissensbestände mit der Ausdifferenzierung der disziplinären Publikationskultur, wie gerade der Erfolg juristischer Wissenschaftsblogs dokumentiert. Um diese Prozesse auszuloten und zugleich für die Herausforderung der Entwicklung neuer Geschäftsmodelle zu sensibilisieren, laden [OABB](#) und [FID <intR>²](#) ein zu einem **Vernetzungsworkshop für Forschende und Bibliotheksangehörige**.*

*Der Online-Workshop findet am **10.12.2020 von 10 bis 15 Uhr** statt. Hier finden sich alle weiteren Informationen.*

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In substance, the “judgment” is unpopular even among the ranks of the PiS which has lost 10 points in the polls. And that is no wonder. This is not a conservative judgment. This is a right-wing extremist judgment. Demanding of the mother, against her will, to carry and give birth to a non-viable fetus – you don’t do that because you care so much about the right to live of the unborn. This is blatantly inhuman treatment of women, nothing more, and on purpose. You do this to show women their place.

What’s more: With this judgment, all Poles suddenly and almost physically realized what it means to no longer have an independent judiciary. To be at the mercy of courts who will come running to every right-wing extremist dog whistle as long as it’s the government who is blowing it. This is not about some abstract rule of law concept but about your *body*, if not your’s then your daughter’s, your sister’s, your wife’s. This is about *every* woman’s body, not just some liberals in Warsaw, Wroclaw and Gdansk. The fate of having to give birth to a child bound to die can hit every woman.

The youth revolts

So it’s no wonder so many took to the streets. First the usual liberals, who all those years had walked in protest against the PiS regime. But quickly a completely different crowd showed up. People in the countryside, in provincial towns where PiS usually reigns supreme. Young folks, 18, 20 years old, who had never been seen demonstrating before, not particularly political, but with a thorough Netflix education and not inclined to take the church’s admonition to not profane Saint Jan Pawe# the Second’s 100th anniversary year by making manifestations against God’s commandment overly seriously. They were out there, in enormous numbers, hundreds of thousands of them, and only some of them formed old-style protest marches. Others simply sat down on the roads and blocked the traffic. Whole cities came to a standstill. Decentralized, leaderless, organized via Instagram and TikTok. Unseizable, unstoppable. And angry, so angry. No slogans, no demands, just: WYPIERDALA#! Fuck off!

On Tuesday afternoon Jarosław Kaczyński, the almighty PiS chairman, stepped in front of the camera, and anyone who thought he would try to calm the waves stood corrected: on the contrary, the little old man chose a mise-en-scène for himself which appeared designed to remind the elderly of the [declaration of martial law by General Jaruzelski](#) in 1981, the trauma of a whole generation of Poles, and the rest of the dictator Lukashenka in Belarus next door. Most of all, however, it was the content of Kaczyński's speech that sent a chill down the spines of many Poles. The deputy prime minister, he who commands the entire internal security apparatus of the republic, called on his supporters to take the defense of the churches in their own hands – a call that the neo-fascist gangs and militias could only understand as directed at themselves: the boss of the security apparatus, sparking civil war.

This is not over yet. How will it end? Nobody knows. President Duda, nowhere to be seen for the longest time, has finally reappeared in public yesterday, after even his daughter and advisor publicly opposed the verdict, and announced that he will mediate a compromise. Those who want to trust such announcements should be reminded of Duda's role in the "[judicial reform](#)" in 2017. The fellow is Kaczyński's creature and nothing justifies the assumption that he is fit for being anything else.

Either way, this weekend will decide whether Kaczyński will escalate the conflict further, whether he will backpedal or be toppled by his own party. Much is possible, and not all of it is cause for joy. One way the government could get the matter pacified would be particularly ironic: it could refuse to publish the verdict in the official gazette. Remember? They used that trick when the constitutional court (still without quotation marks at that time) declared its own subjugation to be unconstitutional in 2016. Legally, there would not be the faintest of argument (except for the quotation marks) to do that, but that sort of concern has never bothered the PiS much this far. Conversely, the publication of the verdict in the middle of the protests would be an effective means of throwing fuel into the fire if that's what the PiS is after.

Meanwhile in Warsaw, military police are securing churches and government buildings. The government had previously been authorized to use the national guard, allegedly to fight the pandemic.

I do hope this all turns out well.

By the way, if you want to show your solidarity here in Berlin: The president of the "Constitutional Tribunal", another Kaczyński creature named Julia Przyłębska, is the wife of the Polish ambassador to Germany. Apparently she took refuge from the excitement in the ambassador's residence in Berlin. There was also [some protest in Lassenstraße 19](#) this week, it seems. We're all Europeans, aren't we? In this together and stuff, right?

Don't forget your face mask.

Thanks to Aleksandra Gliszczynska-Grabias, Małgorzata Szuleka, Tomek Koncewicz, Martin Mycielski and Anna Wójcik for their invaluable input.

This week on Verfassungsblog

More about the abortion verdict in **Poland**: [ANNA RAKOWSKA-TRELA](#) summarizes the background, and [TOMASZ KONCEWICZ](#) calls for the long-standing constitutional foundation of the old constitutional court to be remembered and to call things by their proper names: The current structure under “President” Przybyszka is unconstitutional and illegitimate.

In **Germany**, there has been a lively debate about the distribution of roles between the executive and parliaments in Covid-19 pandemic. [ROMAN LEHNER](#) explains why the polemics about Angela Merkel’s “war cabinet” is nonsense and the demand for a stronger role of parliaments in the Covid-19 policy isn’t.

In the **United States**, the Senate has confirmed Amy Coney Barrett as a judge in the US Supreme Court. At the hearing, the Democratic Senator Sheldon Whitehouse used the opportunity to explore the role of right-wing groups such as the Federalist Society or the Judicial Crisis Network and their deep pockets full of “dark money” in shaping the judiciary in their own image. [ALANI GOLANSKI](#) explains why these efforts undermine the rule of law in the US.

The rule of law is not doing well at all in **Spain** either. Since December 2018, the term of office of the members of the Supreme Judicial Body has expired, but new members have not yet been appointed. A reform of the previous electoral system is now supposed to remedy this, which, however, from the point of view of [NURIA DÍAZ ABAD](#) and the European Commission, is not compatible with EU standards.

This week’s episode in our rule-of-law podcast focuses on a professional group whose importance for the rule of law you may only recognize when you no longer have it: **independent lawyers**. I discuss with [MARGARETE VON GALEN](#), [JEREMY MCBRIDE](#), [MIKOŁAJ PIETRZAK](#) and [COSKUN YORULMAZ](#) how the legal profession is doing in Turkey, Poland, Great Britain, Germany and Europe in general.

In **Bangladesh**, the constitution demands sex equality, but in the opinion of [PSYMHE WADUD](#) this is little more than a beautiful facade for blatant discrimination.

So that we don’t get too depressed by the November rain: In a historic referendum, 78.27% of the **Chilean** people voted in favor of replacing the old Pinochet-era constitution with a new one. [SVENJA BONNECKE](#) discusses the background to the referendum and the content of the future constitution.

After the decision of the State Constitutional Court of **Brandenburg** to unanimously declare the Parity Act unconstitutional, [WOLFGANG HECKER](#) considers state requirements for parties with regard to the selection process for MP candidates to be fundamentally inadmissible and a constitutional amendment necessary.

[ROBERT BROCKHAUS](#), [SIMON GERDEMANN](#) and [CHRISTIAN THÖNNES](#) are concerned about the **German** implementation of the EU Whistleblowing Directive. Instead of finally offering whistleblowers the legal protection they currently lack in

Germany, the Federal Ministry of Economics is aiming for a “1: 1 implementation” limited to European law, which leads to unequal treatment that is constitutionally unjustifiable.

In **Switzerland** two courts have acquitted climate activists because of a “climate emergency”, which is analyzed by [SASKIA STUCKI](#).

In **Kyrgyzstan**, the ruler Sadyr Japarov’s unconstitutional plans threaten to undo all the democratic progress of the past 15 years, according to the analysis of [JULIA EMTSEVA](#).

Jochen Schlenk has contributed to this review.

So much for this week. All the best, especially if you support us on [Steady](#), by Paypal (paypal@verfassungsblog.de) or by bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF), and a joyful whichever-gruesome-holiday-you-celebrate-at-this-season to all of you!

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